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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUNTER ENGINEERS & CONSTRUCTORS, INC.
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MERVYN S. GERSON
915 Fort Street, Suite 504
Honolulu, Hawaii 96813
(808) 524-4800

JOEL J. SPRAYREGEN
Shefsky, Saitlin & Froelich, Ltd.
444 North Michigan Avenue
Suite #2300
Chicago, Illinois 60611
(312) 527-4000
Attorneys for Petitioner

Pandick Midwest, Inc., Chicago • (312) 733-6000

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QUESTIONS PRESENTED

Whether the Ninth Circuit Court of Appeals was correct in holding that the Internal Revenue Service does not need to give a third party lender notice pursuant to Section 6303(a) of the Internal Revenue Code of an assessment against an employer for unpaid employee income withholding taxes and Federal Insurance Contribution Act ("FICA") taxes in order for the Internal Revenue Service to obtain judgment against such third party lender for the employer's liability for these taxes under Section 3505(b) of the Internal Revenue Code.

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IN THE

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HUNTER ENGINEERS & CONSTRUCTORS, INC.
Petitioner,

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on May 21, 1986, which reversed the decision of the United States District Court for the District of Hawaii granting summary judgment in favor of the petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 789 F.2d 1436 (Appendix, infra, 1a-12a). The opinion of the District Court is unreported (13a-15a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1986 (1a-12a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Sections 3505, 6303(a) and 6502(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) and 40 U.S.C. Section 270(a)(d) are set out in a statutory appendix (25a-27a).

STATEMENT OF FACTS

1. On December 5, 1983 the United States ("the government") brought this suit in the United States District Court for the District of Hawaii against the petitioner, Hunter Engineers & Constructors, Inc. ("Hunter") in order to collect all employee withholding taxes and FICA taxes which L & L Construction, Inc. ("L & L"), a third party, had failed to pay to the United States together with accrued penalties and interest for the third and fourth quarter of 1977 (16a-21a). The government sought to impose liability on Hunter as a third party lender pursuant to Section 3505 of the Internal Revenue Code.[1] The basis for the suit by the government was Section 3505(b) of the Code. Hunter filed an answer and raised as a defense, inter alia, the failure of the government to provide Hunter with notice within sixty days of the making of each assessment against L & L for non-payment of federal withholding taxes and FICA taxes as required by Section 6303(a) of the Code (22a-24a).

Hunter moved for summary judgment relying on the failure of the United States to give notice to Hunter of the assessments against L & L as required by Section 6303(a) of the Code (26a-27a). The Government admitted that Hunter, had not been given notice with respect to the assessments against L & L which the government sought to collect from Hunter and asserted that no such notice was required (14a).

The District Court, on September 5, 1984, entered judgment in favor of Hunter on its motion for summary judgment based on the plain language of Section 6303(a) and following the reasoning in all respects of the Seventh Circuit Court of Appeals in *United States v. Associates Commercial Corp.*, 721 F. 2d 1094 (7th Cir. 1983) (13a-15a).

---

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

The government filed an appeal from the decision of the District Court in favor of Hunter with the Ninth Circuit Court of Appeals (1a).

2. The Court of Appeals for the Ninth Circuit reversed the decision of the District Court on May 21, 1986.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Ninth Circuit has decided the tax issue raised in this matter squarely in opposition with the decision of the Eleventh Circuit Court of Appeals in *United States v. Merchants National Bank of Mobile,* 772 F.2d 1522 (11th Cir. 1985) (per curiam), petition for cert. pending to No. 85-1480. The Eleventh Circuit in the latter case rejected the argument of the United States that no notice was required under Section 6303(a) of the Code as a prerequisite to suit against a lender for unpaid federal employment taxes of a third party employer. The Eleventh Circuit followed the decision of the Seventh Circuit Court of Appeals in *United States v. Associates Commercial Corp.,* 721 F2d 1094 (7th Cir. 1983) adopting the rationale of the *Associates* court in holding that Section 6303(a) " 'requires that notice of an assessment of unpaid taxes must be provided to 'each person liable for the unpaid tax' within sixty days after the assessment was made, unless otherwise provided by the Internal Revenue Code.' " 772 F.2d 1522, 1524, citing *Associates,* 721 F.2d at 1098. On the other hand, the Court of Appeals for the Third Circuit has decided a similar case in favor of the government, *United States v. Jersey Shore State Bank,* 781 F.2d 974 (January 10, 1986). The taxpayer in *Jersey Shore* sought certiorari, which was granted on June 2, 1986 (Docket No. 85-1736).

Thus, varying interpretations between the Third, Seventh, Ninth and Eleventh Circuits Courts of Appeals regarding the obligation of the government for providing notice under Section 6303(a) of the Code to a third party lender pursuant to Section

3505 of the Code will result, depending upon the fortuitous circumstance of the Circuit in which suit is brought by the government for collection of federal employment and FICA taxes against such lender.

Additional appeals involving an interpretation of Section 6303(a) of the Code are now pending in the Third[2], Eighth[3], and Ninth[4] Circuits.

2. Section 6303(a) of the Code is clear in its requirement that once the United States has made a tax assessment that notice of that assessment must be given within sixty days "to each person liable for the unpaid tax." (25a-26a). The Ninth Circuit recognizes that the "legislative history addressing Section 3505(b) indicates that lenders are 'persons liable for the unpaid tax[es]' under that section," (citing S. Rep. No. 1708, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3722, 3743). (7a). As noted by Judge Weis in his dissent in *Jersey Shore*, supra.:

> "The reference to 'each person liable' in Section 6303 is not in the least ambiguous. In the case at hand, the government contends that defendant is liable for the tax. Therefore, it seems inescapable that defendant should have been given notice.
>
> The IRS wishes us to redraft that section so that it requires notice only to those individuals against whom taxes have been assessed. The reasons offered for this revision have some logic and would possibly ease administrative burdens on the government, but the arguments are directed to the wrong forum. They should be presented to Congress, not the courts." (11a).

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[2] *United States v. American Bank & Trust Co.*, No. 85-1615.

[3] *United States v. Messina Builders & Contractors Co.*, No. 85-2505.

[4] *United States v. Harvis Construction Co.*, No. 86-1540; *United States v. United California Bank*, No. 85-1873.

In the present case, Hunter made periodic advances under a construction contract to L & L in amounts more than adequate to cover the gross payroll on which the request for advances were based. More than five years after L & L had filed for bankruptcy, and more than six years after L & L had failed to make payment of federal employment and FICA taxes due to the United States, the government filed the present suit against Hunter for third party derivative tax liability pursuant to Section 3505(b) of the Code. At no time did the United States provide notice to Hunter of any assessment which it had made for the unpaid taxes against L & L as required under Section 6303(a) of the Code (26a-27a), although nine months after assessment against L & L and well after the expiration of the 60-day period, the government sent Hunter a Form 4219 asking Hunter to agree that it had liability under Section 3505(b).

The provisions of Section 3505 of the Code imposing liability on third party lenders constitute an extraordinary remedy which Congress enacted in favor of the Government to hold third parties liable for unpaid taxes. H. R. Rep. No. 1884, 89th Cong., 2d Sess. at 20; S. Rep. No. 1708, 89th Cong., 2d Sess. at 21-22.

It is submitted that if Congress had intended that the provisions of Section 6303(a) relative to the sixty days notice of an assessment were not to apply to persons whom the government seeks to hold liable under Section 3505, then an exception would have been placed in the statute to indicate this fact. Such an exception is not, however, present.

As a policy matter, providing timely notice to a lender of an assessment against an employer would put the lender on notice of tax liability and allow the lender to evaluate its relationship with the borrower. The clearest exposition con-

cerning the purpose of the notice requirement of Section 6303(a) in the Section 3505(b) context appears in the District Court opinion in *United States v. Associates Commercial Corp.*, 548 F. Supp. 171, 174 (N.D. Ill. 1982) aff'd, 721 F.2d 1094 (7th Cir., 1983) as follows:

> "Under the plain language of the two sections, it seems clear that (1) the defendant may be liable under section 3505(b) for the withholding tax Dot failed to pay if it lent money to Dot specifically to pay wages knowing that Dot could not or would not make payment of withholding taxes and (2) *under section 6303(a) defendant, if liable for the unpaid tax, was entitled to notice of the assessment thereof. Not only does that conclusion appear to be compelled by a reading of the applicable provisions of the Internal Revenue Code but by common sense.* The defendant here did not learn until more than nine years after it lent money to Dot and more than six years after the assessment was made that the government would seek to recover Dot's unpaid taxes from it. *The possibility of prejudice is obvious. Records and personnel may no longer be available. The opportunity to mitigate by making voluntary payments is lost. Interest mounts. The possibility of recovering from the borrower-employer diminishes. All of these would be obviated by notice."* [Emphasis added].

3. The opinion of the Ninth Circuit in the present case failed to take notice of the fact that the filing of the tax assessment confers additional procedural benefits upon the government. Under Section 6501 of the Code, once the Internal Revenue Service has made the assessment within three years from the time that the tax liability arises against the employer, then it has the benefit of an additional six year period of time in order to file suit. However, the Ninth Circuit held that assessing L & L gives the United States an additional six years to sue a third party lender, contrary to the holding of *United States v. Associates Commercial*, supra, that failure to give the Section 6303(a) notice bars such suit. (11a). The

government, therefore, has the advantage in the Ninth Circuit of an additional six years in which to bring suit without any responsibility for giving a third party lender notice of such tax assessment, which would allow the third party lender to evaluate its ongoing relationship with the employer borrower, knowing that the government intends to hold the lender liable for the taxes.

4. As noted previously, certiorari was granted on June 2, 1986, in the case of *United States v. Jersey Shore State Bank*, supra. Due to the fact that the instant case also involves a consideration of the same tax issues raised with regard to an interpretation of the notice provision of Section 6303(a) of the Code as it relates to liability sought to be imposed on a third party lender under Section 3505 of the Code, it is submitted that the petition for certiorari in the instant case should be granted and joined for argument with *Jersey Shore State Bank*, supra, before this Court.

Alternatively, the petitioner would request that the judgment of the Ninth Circuit Court of Appeals in the instant case be stayed pending a decision by this Court with regard to the issue noted above.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MERVYN S. GERSON
JOEL J. SPRAYREGEN
Attorneys for Petitioner

July, 1986

APPENDIX

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TO BE PUBLISHED

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

United States of America, *Plaintiff-Appellant,* *vs.* Hunter Engineers & Constructors, Inc., *Defendant-Appellee.*	No. 84-2652 DC No. CV 83-1305 JLI OPINION

Appeal from the United States District Court
for the District of Hawaii
J. Lawrence Irving, District Judge, Presiding

Argued and Submitted November 20, 1985
Honolulu, Hawaii

Before: SKOPIL, FLETCHER, and ALARCON, Circuit Judges SKOPIL, Circuit Judge:

The United States appeals the district court's summary judgment in favor of Hunter Engineers & Constructors, Inc. ("Hunter"). The issue on appeal is whether the United States' failure to give notice to a third party lender within sixty days of assessment against an employer for unpaid withholding taxes bars a subsequent civil action against the lender to collect the taxes. We conclude no such notice is required and the action is not barred. We reverse and remand for further proceedings.

FACTS AND PROCEEDINGS BELOW

The United States sought a personal judgment against Hunter for tax liability under 26 U.S.C. § 3505(b) (1982). The alleged liability arose from unpaid federal withholding taxes owed by Hunter's subcontractor, L&L Construction, Inc. ("L&L"). Hunter allegedly supplied funds to L&L for the purpose of paying L&L's employees' net wages with actual or constructive notice that L&L would not remit the corresponding withholding taxes to the United States.

On December 5 and 19, 1977 the United States assessed L&L for unpaid withholding taxes due for the second and third quarters of 1977.[1] Hunter was not given notice of L&L's assessments until September 19, 1978. When the government sought to collect from Hunter, Hunter claimed that either it was not liable under section 3505(b) or that the government's action was barred for failure to give timely notice. The government commenced this action in the district court on December 5, 1983, exactly six years after the first assessment.

STANDARD OF REVIEW

The issue presented on appeal is purely legal. Our review is *de novo. See United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984). *See also Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983) (trial court's grant of summary judgment *reviewed de novo).*

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[1] Assessment of a tax is "no more than the ascertainment of the amount due and the formal entry of that amount on the books of the [S]ecretary [of Treasury]." *United States v. Dixieline Financial, Inc.,* 594 F.2d 1311, 1312 (9th Cir. 1979).

DISCUSSION

A. Statutory Background.

The United States premises Hunter's liability on section 3505(b), which imposes liability on a lender who supplies funds to an employer for the specific purpose of paying wages knowing that the "employer does not intend to or will not be able to make timely payment" of the corresponding withholding taxes.[2] 26 U.S.C. § 3505(b) (1982). The district court, however, did not determine Hunter's liability because it found that the United States failed to give Hunter timely notice as provided by 26 U.S.C. § 6303(a) (1982).

Seciton 6303(a) reads in pertinent part:

> *(a) General rule.* Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and *within 60 days, after the making of an assessment* of a tax pursuant to section 6203, *give notice to each person liable* for the unpaid tax, stating the amount and demanding payment thereof. . . .

26 U.S.C. § 6303(a) (1982) (emphasis added).[3]

The government argues that section 6303(a) requires notice only to taxpayers who have been assessed for delinquent taxes. This follows from the government's conclusion that

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[2] Use of the word "lender" is not intended to limit the applicability of section 3505(b) only to lenders. It is used instead as a convenient way to refer to all persons who may be subject to section 3505(b) liability. *See United States v. Associates Commercial Corp.*, 721 F.2d 1094, 1098 n.9 (7th Cir. 1983).

[3] Section 6303(a) is found in Subtitle F of the code regarding "Procedure and Administration." The tax liability imposed by section 3505(b) is found in Subtitle C regarding "Employment Taxes." Section 3505(b) does not authorize any action but merely defines the tax liability. The procedural requirements for enforcement of liabilities are set forth in Subtitle F. *See United States v. Associates Commercial Corp.*, 548 F. Supp. 171, 175 n.1 (N.D. Ill. 1982), *aff'd*, 721 F.2d 1094 (7th Cir. 1983).

notice is only essential to the administrative collection process (lien and levy) and, therefore, need not be given to those incurring third party liability for taxes. Additionally, the government argues that, as a practical matter, it is impossible to give notice to third party lenders within sixty days of assessment against an employer. Even if notice must be given to lenders, the government asserts that failure to give such notice does not bar its common law right to sue on a debt.

Hunter contends that even if the government can sue independently for the liability in some cases, it cannot do so here because the statute of limitations has run. The government could independently bring an action, Hunter argues, against either L&L or Hunter within three years of L&L's filing, or it could timely assess and notify L&L of the assessment, thereby procuring an additional six years in which to sue L&L. *See* 26 U.S.C. §§ 6501(a), 6502(a)(1) (1982). But, Hunter concludes, in order for the assessments against L&L to extend the statute of limitations by six years for an action against Hunter, the government was required to give Hunter timely notice of the assessments.

B. Section 6303(a) Notice Requirements.

Hunter relies on *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983). There, the Seventh Circuit held that failure to give a lender timely section 6303(a) notice barred an action by the United States against that lender. *Id.* at 1100. The United States sued the lender to collect taxes due under section 3505(b) more than three years after the assessments against the employer. The government did not give the lender notice within sixty days of the assessments. In holding that the lack of timely notice barred the government's action, the court reasoned that the lender is a "person liable for the unpaid tax" because the lender's liability is a derivative tax liability of the employer. *Id.* at 1098. Since Congress did not specifically override the notice requirement in section 3505(b),

the Seventh Circuit reasoned that Congress intended section 6303(a) to apply to section 3505(b) actions. *Id.* at 1099 n.10.

That position has also been adopted by the Eleventh Circuit in *United States v. Merchants National Bank of Mobile,* 772 F.2d 1522 (11th Cir. 1985)(per curiam), *app. for cert. pending* (Sup. Ct. No. 85-1480). In *Merchants,* the United States brought an action against a lender more than three years after assessments against the employer. The lender did not receive timely notice of the assessments. *Id.* at 1523. The court held that the government's failure to give the statutorily prescribed notice within sixty days barred the action. *Id.* at 1524; *see also United States v. Messina Builders and Contractors Co.,* No. 84-0668-CV-W-9, ____ F. Supp. ____, (W.D. Mo. Oct. 10, 1985)(adopting holding in *Associates*); *United States v. American Bank & Trust Co. of Pennsylvania,* 623 F. Supp. 708, 710 (E.D. Pa. 1985)(same).

More recently, the Third Circuit rejected the holding in *Associates.* In *United States v. Jersey Shore State Bank,* 781 F.2d 974 (3d Cir. 1986), a divided court held that the government's failure to provide a third party lender with notice of the assessments against a taxpayer did not bar an action against the lender to collect tax liabilities under section 3505. *Id.* at 981; *see also United States v. National Acceptance Co. of America,* 603 F. Supp. 1351, 1353 (E.D. Mich. 1985)(rejecting holding of *Associates*); *United States v. Marine Midland Bank,* 544 F. Supp. 268, 270-71 (W.D.N.Y. 1982) (holding no authority existed to require section 6303 notice to a lender in order to institute a section 3505(b) action). The majority in *Jersey Shore* reached its conclusion in what we conclude is a careful and thoughtful review of the statutory scheme, the legislative history, and the relative burdens placed on both parties by its decision. We are persuaded by our examination of the majority's reasoning in *Jersey Shore.* We therefore adopt its holding that the government is not required to provide a lender with section 6303(a) notice as a prerequisite to a section 3505 action.

Both *Associates* and *Jersey Shore* appropriately begin with an examination of the plain meanings of sections 3505(b) and 6303(a). *E.g., Hughes Air Corp. v. Public Utilities Commission,* 644 F.2d 1334, 1337 (9th Cir. 1981) (primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language). Section 6303(a) states that "each person liable for the unpaid tax" shall be given notice within sixty days of assessment. 26 U.S.C. § 6303(a) (1982). It does not provide that only "taxpayers" or "persons assessed against" are to be given notice. Further, the government does not contend that Congress "otherwise provided," that notice need not be given to lenders who are liable for taxes assessed against an employer. If section 6303(a) required nothing more than notice "to each person liable for the unpaid tax," we would be persuaded that such clear and unambiguous language "be regarded as conclusive." *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). But the statute also requires the notice to state the amount owing and to make demand for payment. 26 U.S.C. § 6303(a). The court in *Jersey Shore* found these added requirements to be significant in determining the intent of Congress. *Jersey Shore,* 781 F.2d at 978.

Section 6303(a) clearly was intended to provide the taxpayer with a demand for payment to allow the taxpayer "one last opportunity to pay the taxes before the government invokes the full panoply of its administrative collection powers." *Id.* But notice to a lender cannot fulfill these purposes. First, Congress did not authorize assessment against third parties under section 3505 to enable the government to use its lien and levy powers. *See United States v. First National Bank of Circle,* 652 F.2d 882, 889 (9th Cir. 1981); *United States v. Dixieline Financial,* 594 F.2d 1311, 1312-13 (9th Cir. 1979). Second, the amount of tax liability due from the taxpayer could only fortuitously be the same for the third party lender. *See Jersey Shore,* 781 F.2d at 878. The lender is not liable for the

employer's portion of payroll taxes and under section 3505(b) liability is limited to twenty-five percent of its loan. Thus, the employer's liability in the 6303(a) notice probably overstates the lender's potential liability. *Id.* Finally, a section 6303(a) demand for collection is not a demand to the third party lender for payment. At that point in the collection process the government is seeking to collect from the taxpayer employer and not the lender.

These factors pursuade us that Congress likely did not intend to require that notice of assessment be sent to third party lenders. While section 6303(a) is not completely unambiguous, a reasonable interpretation is that notice is required only to individuals against whom the taxes have been assessed and not to third party lenders.

When the language of a statute does not clearly reveal congressional intent, it is appropriate to turn to legislative history. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981). The legislative history addressing section 3505(b) indicates that lenders are "persons liable for the unpaid tax[es]" under that section. S. Rep. No. 1708, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3722, 3743. The Committee on Finance stated, "where third persons finance employers' payrolls . . . they should be liable for the withholding taxes." *Id.* The Committee went on to say that section 3505(b) makes lenders "liable for the payment of withholding taxes. . . ." *Id.* While these statements are unequivocal and clearly indicate Congress' intent that lenders be liable within the ambit of section 3505(b), they do not indicate whether lenders are due the notice specified in section 6303(a).

The legislative history of section 6303(a) is more enlightening. *See Jersey Shore*, 781 F.2d at 979-81. The predecessor to section 6303(a) explicitly applied only to the Tax Collector's use of administrative collection processes. I.R.C. § 3655

(1952). Civil action could be commenced only by the Commissioner. I.R.C. § 3740 (1952). Assessment and notice were not prerequisites to a civil action to collect taxes. *See United States v. Erie Forge Co.*, 191 F.2d 627, 631 (3d Cir. 1951), *cert. denied*, 343 U.S. 930 (1952). The correlation between the type of collection process and the notice due was readily defensible. Upon assessment and demand a taxpayer's property became subject to summary administrative processes. The purpose of notice was to protect the taxpayer. That need is not as evident in an action under section 3505, where the government cannot proceed administratively. *Jersey Shore*, 781 F.2d at 979-80.

Section 6303(a) was intended to make only "two changes from existing law," neither of which affected who was entitled to receive notice. *See* H.R. Rep. No. 1337, 83d Cong., 2d Sess. A405-06, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4017, 4553; S. Rep. No. 1622, 83d Cong. 2d Sess. 574, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4621, 5222-23. A more significant change was made administratively when the office of Tax Collector was abolished and the power to summarily collect taxes was turned over to the Commissioner. *See Jersey Shore*, 781 F.2d at 981. Congress was fully aware of that change when it enacted the 1954 Code because it incorporated the reorganization by reference. 26 U.S.C. § 7804 (1982). The predecessor to section 6303(a) clearly required notice to only those subject to administrative collection processes. Although the Commissioner eventually assumed both administrative and civil collection responsibilities, nothing indicates that section 6303(a) was intended to apply to the government's civil collection actions. We agree with the Third Circuit that there is no indication in the legislative history that Congress intended on enactment of the 1954 Code to change the law with respect to who must receive notice of assessment. *Jersey Shore*, 781 F.2d at 981.

Finally, Hunter argues that we have previously indicated that section 6303(a) notice to lenders is required. In *Dixieline*,

594 F.2d at 1313, the lender argued that the government was required under section 3505(b) to file an independent assessment against the lender. We rejected that contention and held that section 3505(b) does not require assessment against the lender because assessments need only be made pursuant to tax returns. *Id.* at 1312. Since the lender's liability resulted from the employer's tax deficiency, only the employer need be assessed. Nevertheless we stated:

> Dixieline [lender] protests that without requiring this liability to be assessed against it, it would not have due notice of the fact that the government is looking to it for payment. This is not so. 26 U.S.C. § 6303 requires that notice of the assessment be given within 60 days "to each person liable for the unpaid tax." If Dixieline was not given notice of the assessment against the employer of the tax for which it is being held liable, then the case may present a question as to the consequences that flow from that fact. [Footnote omitted.] However, dismissal by the district court was not based on failure to give notice but on failure to assess against Dixieline a tax already assessed against the employer.

Id. at 1313 (emphasis added).

Admittedly, our language can be interpreted to imply that notice to lenders is required. Indeed, courts have relied in substantial part on Dixieline to conclude that notice to lenders is required. *See, e.g., Associates,* 721 F.2d at 1099-1100; *United States v. Merchants National Bank of Mobile,* No. 83-0266-T (S.D. Ala. May 31, 1984), *aff'd,* 772 F.2d 1522 (11th Cir. 1985). We believe that reliance was misplaced. We clearly indicated that only the issue of a separate assessment to the lender was before us. *Dixieline,* 594 F.2d at 1313. In fact, we acknowledged the government's argument that the failure to give notice does not void the assessment and does not prevent recovery by civil action. *Id.* at n.4. We did not decide the issue because "this question [was] not presented here." *Id.* We believe we clearly reserved the issue for another day. *Dixieline*

does not alter our conclusion today that section 6303(a) does not require notice to third party lenders facing potential liability under section 3505.

C. Statute of Limitations.

Notwithstanding the power of the government to bring a civil action in the absence of notice of the assessments to Hunter, a question still remains as to the applicable statute of limitations. Section 6501(a) provides in pertinent part:

> *(a) General rule.* Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. § 6501(a) (1982)(emphasis added). The section establishes a general three-year statute of limitations for debt collection actions. Section 6501(a) is qualified by section 6502(a)(1) which reads:

> *(a) Length of period.* Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within 6 years after the assessment of the tax . . . .

26 U.S.C. § 6502(a)(1) (1982)(emphasis added). This section affords the government an additional six years after the assessment date to commence an action. *See also* 26 C.F.R. § 31.3505-1(d)(1) (1985)(government may collect from lender by "civil proceeding commenced within 6 years after assessment of the tax against the employer").

As evidenced by these statutes and regulation, assessment is more than just an administrative step in the enforcement of liens and levies. Assessment also serves to extend the statute of

limitations. Hunter complains that an assessment against the employer should not serve as an extension of time to proceed against a lender, especially when timely notice of the assessment is not given to the lender.

In *Associates,* the Seventh Circuit reasoned that Congress sought in section 3505 to establish a nexus between the taxpayer's obligation and the lender's liability. *Associates,* 721 F.2d at 1097. Section 3505(c) provides that any collection from the employer is a credit against the lender's liability. "Because of the marriage between a lender's liability and a taxpayer's liability, the limitations period with respect to the lender's liability should be coterminous with the limitations period applicable to the taxpayer." *Id.*

Aside from congressional intent, we conclude that a shorter limitations period for lenders than employers would serve to thwart the government's efforts to collect the tax liabilities from the employer. The government would be forced to file an action against the lender within three years of the assessment even if collection efforts against the employer were ongoing. Although Hunter would benefit from a shorter limitations period, lenders as a lot would suffer if the government was forced to look to them for collection sooner than against employers.

Finally, Hunter argues that an extended statute of limitations in the absence of notice creates an unreasonable source of prejudice to the lender. *See Jersey Shore,* 781 F.2d at 984 (Judge Weis, dissenting)(notice to the lender allows it to preserve pertinent records, arrange for payment, compromise, or take other steps in its best interest); *American Bank & Trust,* 623 F. Supp. at 710 (noting the possibility of prejudice to the lender not receiving notice). The answer, we believe, is found in Congress' formulation of section 3505. Liability is imposed on a third party lender only if the lender has actual knowledge that the employer does not intend to pay the required taxes, or if the lender itself is directly paying net wages. 26 U.S.C.

§§ 3505(b) and (a). Thus, the lender is "actually or constructively aware of its *potential* liability for the taxes required to be deducted and withheld." *Jersey Shore*, 781 F.2d at 982 (emphasis in original). While we agree that this statutory scheme does not wholly negate the possibility of prejudice to the lender, it is clear that Congress sought to impose liability only when the government could meet its burden of proof under section 3505. Thus, we conclude that a lender who is liable under section 3505 must have necessarily been intimately involved in the employer's failure to pay taxes and consequently does not need formal notice of such liability to enable it to defend itself in a subsequent action.

CONCLUSION

The district court erred in holding that this action was barred by the government's failure to give timely notice of the assessments against L&L. The assessments against L&L served to extend the statute of limitations against Hunter so that this action was timely filed.

REVERSED and REMANDED.

Filed in the
United States District Court
District of Hawaii
September 5, 1984
at 9 o'clock and 5 min. am.
Walter A. Y. H. Chinn, Clerk

UNITED STATES DISTRICT COURT

District of Hawaii

United States of America,
Plaintiff,

v.

Hunter Engineers & Constructors, Inc.,
Defendant.

Civil No. 83 1305

Memorandum Decision and Order

Defendant's motion to dismiss or, in the alternative, for summary judgment came on for hearing on July 23, 1984. Having considered the pleadings, all papers filed in support of and in opposition to the motion, and the oral argument of counsel, the court hereby grants defendant's motion for summary judgment.

BACKGROUND

The government seeks to impose liability on defendant HUNTER ENGINEERS & CONSTRUCTORS, INC. ("HUNTER") under 26 U.S.C. § 3505(b). HUNTER allegedly provided funds to L & L Construction, Inc. ("L & L") for the specific purpose of paying wages to L & L employees with knowledge that L & L did not intend to or would not be able to pay the withholding tax. *See* Complaint, ¶ 7. HUNTER moves to dismiss or for summary judgment on the ground that the government did not comply with the notice provision of 26 U.S.C. § 6303(a).

DISCUSSION

Section 6303(a) provides:

> Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

26 U.S.C. § 6303(a) (1982). The Secretary of the Treasury made assessments against L & L for the unpaid withholding tax on December 5 and 19, 1977. *See* Complaint, ¶ 5. Notice was not mailed to HUNTER, however, until September 1978. *See* Affidavit of Ralph K. Miller, ¶ 5 & Exhibit A.

The government argues that § 6303(a) does not require notice to a person subject to § 3505(b) liability. Two courts have squarely addressed this question. *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983); *United States v. Marine Midland Bank*, 82-1 U.S. Tax Cas. ¶ 9362 (W.D.N.Y. 1982). The Seventh Circuit held § 6303(a) applicable in § 3505(b) cases, while the Western District of New York held it inapplicable.

Although it has not directly addressed the question, the Ninth Circuit in *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311 (9th Cir. 1979) implied that § 6303(a)'s notice requirement would apply in a § 3505(b) case. In the *Dixieline* case, Dixieline argued that a separate assessment had to be made against it because otherwise it would not have due notice of the government's assertion of § 3505(b) liability. The court rejected this argument, stating:

> 26 U.S.C. § 6303 requires that notice of the assessment be given within 60 days "to each person liable for the unpaid tax." If Dixieline was not given notice of the assessment

> against the employer of the tax for which it is being held liable, then the case may present a question as to the consequences that flow from that fact.

Id. at 1313. The clear implication of these statements is that § 6303(a) mandates notice to a person subject to § 3505(b) liability. In fact, the Seventh Circuit in the *Associates Commercial* case relied on *Dixieline* in reaching the same conclusion.

Based on *Dixieline* and the plain language of § 6303(a), this court finds the reasoning of the *Associates Commercial* court persuasive and follows it in all respects. Accordingly, defendant HUNTER's motion for summary judgment is granted.

IT IS SO ORDERED.

DATED: August 30, 1984.

/s/ J. LAWRENCE IRVING
J. Lawrence Irving, *Judge*
United States District Court

COPIES TO ALL COUNSEL

Filed in the
United States District Court
District of Hawaii
December 5, 1983
at 9 o'clock and 30 min. am.
Walter A. Y. H. Chinn, Clerk

DANIEL A. BENT
United States Attorney
District of Hawaii

MICHAEL CHUN
Assistant U.S. Attorney
Room C-242, U.S. Courthouse
300 Ala Moana Blvd., Box 50183
Honolulu, Hawaii 96850
Telephone: (808) 546-7170

ANGELO I. CASTELLI
Senior Trial Attorney
Department of Justice
Tax Division
Washington, D.C. 20530
Telephone: (202) 724-6415

Attorneys for United States of America

IN THE UNITED STATES DISTRICT COURT
For the District of Hawaii

United States of America, *Plaintiff,*	Civil No. 83 1305
vs.	
Hunter Engineers & Constructors, Inc., *Defendant.*	Complaint; Summons

COMPLAINT

The United States of America, by its attorney, Daniel A. Bent, United States Attorney for the District of Hawaii, complains and alleges as follows:

1. This is an action to collect taxes withheld from wages paid employees of L & L Construction, Inc. a Hawaiian corporation.

2. This action is brought pursuant to 26 U.S.C., Section 7401 under the direction of the Attorney General of the United States, at the request and with the authorization of Chief Counsel, Internal Revenue Service, a delegate of the Secretary of the Treasury.

3. The Court has jurisdiction over this action pursuant to 26 U.S.C., Section 7402, and 28 U.S.C., Section 1340 and Section 1345.

4. Defendant Hunter Engineering & Constructors, Inc., is a Pennsylvania corporation with business offices located at 2828 Paa Street, Honolulu, Hawaii, within this judicial district. Venue is properly laid in this district pursuant to 28 U.S.C., Section 1396.

5. On the date set out below, a delegate of the Secretary of the Treasury made assessments against L & L Construction, Inc., for unpaid Federal Income Withholding and Federal Insurance Contributions Act taxes for the periods and in the amounts indicated:

Period	Date Assessed	Tax Assessed
6-30-77	12-05-77	$47,383.47
9-30-77	12-19-77	33,788.64

6. Despite notice and demand for payment, as of this date L & L Construction, Inc., remains indebted to the United States on the assessments described above, including $42,313.09 in tax that was to have been deducted from wages paid employees of L & L Construction, Inc.

7. During the quarters ending June 30, 1977, and September 30, 1977, defendant Hunter Engineering & Constructors,

Inc., supplied funds to pay wages to employees of L & L Construction, Inc., with actual notice of knowledge that L & L Construction, Inc., did not intend to or would be unable to timely pay or deposit the amount of taxes required to be withheld for such wages. The amount of funds supplied to pay wages was $169,252.37.

8. Due to its actions as described in paragraph 7, above, defendant Hunter Engineering & Constructors, Inc., is liable to the United States in the amount of $42,313.09, plus interest thereon, pursuant to 26 U.S.C., Section 3505(b).

WHEREFORE, the United States prays that judgment be entered in its favor against defendant Hunter Engineering & Constructors, Inc., in the amount of $42,313.09, plus interest thereon, together with its costs and such other and further relief as is just and proper.

DATED: December 5, 1983, at Honolulu, Hawaii.

DANIEL A. BENT
United States Attorney
District of Hawaii

By /s/ MICHAEL CHUN
Michael Chun
Assistant U.S. Attorney

ATTEST: A True Copy
WALTER A.Y.H. CHINN
Clerk, United States District Court, District of Hawaii

By (Illegible)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

District Hawaii

United States of America,	*Plaintiff,*	Docket No.
v.		To: (Name and Address of Defendant)
Hunter Engineers & Constructors, Inc.,	*Defendant.*	Hunter Engineers & Constructors, Inc. 2828 Paa Street Honolulu, Hawaii 96819

YOU ARE HEREBY SUMMONED and required to serve upon

(PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)

Daniel A. Bent
United States Attorney
Michael Chun
Assistant U.S. Attorney
PJKK Federal Building
U.S. Courthouse, Room C-242
and
300 Ala Moana Boulevard
Box 50183
Honolulu, Hawaii 96850

Angelo Castelli
Senior Trial Attorney
Department of Justice
Tax Division
Washington, D.C. 20530

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
WALTER A.Y.H. CHINN

DATE
DEC. 5, 1983

DEPUTY CLERK
CYNTHIA HONG

BEST AVA

U.S. Department of Justice
United States Marshals Service

PROCESS RECEIPT AND RETURN
See Instructions for "Service of Process by the U.S. Marshal" on the reverse of this form.

PLAINTIFF: United States of America	COURT CASE NUMBER: Civil No. 83-130
DEFENDANT: Hunter Engineers & Constructors, Inc.	TYPE OF PROCESS: Complaint; Summons

SERVE AT: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
Hunter Engineers & Constructors, Inc.
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
2828 Paa Street, Honolulu, Hawaii 96819

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

MICHAEL CHUN
Assistant U.S. Attorney
Rm. C-242, U.S. Courthouse
300 Ala Moana Blvd., Box 50183
Honolulu, Hawaii 96850

Number of process to be served with this Form - 285	1
Number of parties to be served in this case	1
Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (*Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available For Service*):

Fold

Signature of Attorney or other Originator requesting service on behalf of: ☒ PLAINTIFF ☐ DEFENDANT | TELEPHONE NUMBER: 546-7170 | DATE: 12/5/83

Michael Chun

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY — DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated. (Sign only first USM 285 if more than one USM 285 is submitted)	Total Process	District of Origin	District to Serve	Signature of Authorized USMS Deputy or Clerk	Date
		No.	No.		12/5/83

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above (See remarks below)

Name and title of individual served (if not shown above)

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

Address (complete only if different than shown above)

Date of Service | Time

Signature of U.S. Marshal or Deputy

Service Fee	Total Mileage Charges (including endeavors)	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal*	Amount of Refund

REMARKS:

LABLE COPY

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	DATE
NAME OF SERVER	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Other (specify) _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

21a

Filed in the
United States District Court
District of Hawaii
December 23, 1983
at 10 o'clock and 15 min. am.
Walter A. Y. H. Chinn, Clerk

Of Counsel:
GERSON & BOCCUTO
Attorneys at Law

MERVYN S. GERSON
915 Fort Street, Suite 504
Honolulu, Hawaii 96813

Attorney for Defendant
Hunter Engineers & Constructors, Inc

IN THE UNITED STATES DISTRICT COURT
For the District of Hawaii

United States of America, *Plaintiff,*	Civil No. 831305
vs.	
Hunter Engineers & Constructors, Inc., *Defendant.*	Answer

ANSWER

Defendant, by and through its attorney, Mervyn S. Gerson, for its answer to Plaintiff's Complaint states:

1. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, 5 and 6.

2. Defendant admits the allegations contained in Paragraphs 3 and 4.

3. Defendant denies the allegations contained in Paragraphs 7 and 8.

FIRST DEFENSE

4. Plaintiff failed to give the notice required by 26 U.S.C., Section 6303(a) within the required time period, thus barring this cause of action.

SECOND DEFENSE

5. Plaintiff, through its failure to notify Defendant of its possible liability as required by 26 U.S.C., Section 6303(a), and further by its settlement with and release of other third parties who were secondarily liable for the taxes in dispute, has waived and released Defendant from any liability to which it might have been subject.

WHEREAS, Defendant demands judgment that the Plaintiff's Complaint be dismissed, that it recover its costs in this action, and that it be granted any and all other relief to which it may appear to be entitled.

MERVYN S. GERSON
Mervyn S. Gerson
Attorney for Defendant
915 Fort Street, Suite 504
Honolulu, Hawaii 96813

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the ANSWER in *United States of America* vs. *Hunter Engineers & Constructors, Inc.*, CIVIL NO. 831305 in the United States District Court for the District of Hawaii by mailing copies thereof for delivery by regular mail by the United States Postal Service on *December 23, 1983* to the following:

DANIEL A. BENT
U.S. Attorney
Room C-242
300 Ala Moana Boulevard
P.O. Box 50183
Honolulu, Hawaii 96850

MICHAEL CHUN
Assistant U.S. Attorney
Room C-242
300 Ala Moana Boulevard
P.O. Box 50183
Honolulu, Hawaii 96850

ANGELO I. CASTELLI
Senior Trial Attorney
Department of Justice
Tax Division
Washington, D.C. 20530

/s/ MERVYN S. GERSON
Mervyn S. Gerson
Attorney for Defendant

Section 3505. *Liability of Third Parties Paying or Providing for Wages.*

(a) Direct Payment by Third Parties.—For purposes of Sections 3102, 3202, 3402, and 3403, if a lender, surety, or other person, who is not an employer under such sections with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.

(b) Personal Liability Where Funds are Supplied.—If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of Section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

* * * * *

Section 6303. *Notice and Demand for Tax.*

(a) General Rule.—Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of tax pursuant to

Section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

* * * * *

Section 6501. *Limitations on Assessment and Collection.*

(a) General Rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

Section 6502. *Collection After Assessment.*

(a) Length of Period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under Section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by the subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

* * * * *